

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VISITING NURSE ASSOCIATION-)
ST. LOUIS, VISITING NURSE)
ASSOCIATION OF GREATER)
ST. LOUIS f/k/a VISITING NURSE)
ASSOCIATION HOME HEALTH CARE,)
VISITING NURSE ASSOCIATION)
HOSPICE CARE, and VNA SERVICES)
CORPORATION)

Appellants,)

v.)

Appeal No. 02-4150

VNA HEALTHCARE, INC.,)
VNA HOMECARE, INC.,)
VISITING NURSES HOSPICE, VNA)
PRIVATECARE, INC., and)
VNA PRIVATE DUTY, INC.)

Appellees.)

OPENING BRIEF OF APPELLANTS

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is a case in which the Visiting Nurse Association - St. Louis and its affiliates, a Missouri not-for-profit organization which also goes by the name “VNA,” challenge the right of VNA Homecare, Inc. and its affiliates, an Illinois for-profit corporation, to use the names “Visiting Nurse Association” and “VNA,” or any combination of those names or names which include those names, within the Plaintiffs’ Trade Area in the State of Missouri. The action seeks injunctive relief, which was denied by the trial court, for violation of a common law trade name, for deceptive trade practices, and for violation of Missouri’s Anti-Dilution Statute. The lower court found that the name was generic, the Plaintiffs were guilty of laches, and there was not sufficient evidence of confusion to warrant relief. Plaintiffs believe these findings were unsupported in fact or law. The trial court also refused to enforce a settlement agreement finding there was no meeting of the minds. Plaintiffs believe this was also unsupported as a matter of law.

Plaintiffs request twenty (20) minutes for oral argument so that Plaintiffs may address the issues which demonstrate the inconsistencies in the trial court’s reasoning and explore the issue of refusal to enforce the settlement agreement, which issue depends upon admissions of the parties in documents filed with the trial court and part of the record.

CORPORATE DISCLOSURE STATEMENT

Appellants, Visiting Nurse Association-St. Louis, Visiting Nurse Association of Greater St. Louis f/k/a Visiting Nurse Association Home Health Care, Visiting Nurse Association Hospice Care, and VNA Services Corporation, are all controlled by the Appellant, Visiting Nurse Association-St. Louis. There are no other wholly owned subsidiaries, not any ownership by a publicly held company.

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II. The trial court erred as a matter of law in determining that the doctrine of laches operated to preclude Plaintiffs’ request for preliminary injunction in that the result is clearly erroneous, being unsupported by the record, since Defendants failed to present any evidence of prejudice, which is a requirement to meet their burden for this affirmative defense. 46

III. The trial court erred as a matter of law in determining that the likelihood of confusion was not sufficient to warrant the issuance of a preliminary or permanent injunction because the finding was internally inconsistent on its face and against the weight of the trial court’s finding that Plaintiffs presented considerable evidence of confusion. 50

IV. The trial court erred as a matter of law in holding in its Memorandum and Order of January 29, 2002, that there was no meeting of the minds between the parties sufficient to create a binding oral contract as of December 13, 2001, concerning settlement of the litigation, and that there was therefore no enforceable agreement, in that the unrefuted record showed that there was a sufficient meeting of the minds to find a binding contract as a matter of law. 56

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JURISDICTIONAL STATEMENT

This is an appeal from the order and Final Judgment of the District Court of the Eastern District of Missouri, the Honorable E. Richard Webber presiding, dated November 6, 2002, denying Plaintiffs' request for a permanent injunction and other relief on Plaintiff's claims for Common Law Trade Name Infringement, Unfair Competition and Violation of the Missouri Anti-Dilution Statute, §417.061 RSMo (2000). The Final Judgment was a final decision of the district court disposing of all parties' claims and this Court has jurisdiction pursuant to 28 U.S.C. §1291. This appeal was filed on December 3, 2002, within thirty (30) days of the final order of the District Court as required by Federal Rule of Appellate Procedure 4(a)(1)(A).

The case was originally filed in the Circuit Court for St. Louis County, Missouri on October 22, 2001 and was removed by defendants on October 29, 2001 based on diversity of citizenship pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, because all plaintiffs were citizens of Missouri and all defendants were citizens of Illinois.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The trial court erred as a matter of law in determining that the terms AVisiting Nurse Association® and “VNA” are generic marks not entitled to trade name protection rather than descriptive marks identifying Plaintiffs to consumers because the evidence demonstrated at trial, and Defendants admitted, that the term AVisiting Nurse Association® is descriptive in that it tells something about the service provided by Plaintiffs, and “VNA” is fanciful, both having been utilized continuously by Plaintiffs in the Trade Area for over ninety years, so that they now clearly identify Plaintiffs in Plaintiffs’ Trade Area.

Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc., 758 F.Supp. 512

(E.D.Mo. 1991).

Home Builders Association of Greater St. Louis v. L & L Exhibition Management,

Inc., 226 F.3d 944 (8th Cir. 2000).

Better Business Bureau of Kansas City Advertising Club v. Chappel,

307 S.W.2d 510 (Mo. App. 1957).

Visiting Nurse Society of Central Stark County, Inc. et al. v. All-Ohio Home

Health Care, Inc. et al., 1983 WL 5653 (Ohio App. 5 Dist. 1983).

Section 417.061, RSMo (2000).

II. The trial court erred as a matter of law in determining that the doctrine of laches operated to preclude Plaintiffs' request for preliminary injunction in that the result is clearly erroneous, being unsupported by the record, since Defendants failed to present any evidence of prejudice, which is a requirement to meet their burden for this affirmative defense.

Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc., 758 F.Supp. 512

(E.D.Mo. 1991).

Hurst v. United States Postal Service, 586 F.2d 1197 (8th Cir.1978).

III. The trial court erred as a matter of law in determining that the likelihood of confusion was not sufficient to warrant the issuance of a preliminary or permanent injunction because the finding was internally inconsistent on its face and against the weight of the trial court's finding that Plaintiffs presented considerable evidence of confusion.

Champions Golf Club, Inc. v. The Champions Golf Club, Inc., 78 F.3d 1111

(6th Cir. 1996).

LensCrafters, Inc. v. Vision World, Inc., 943 F.Supp.1481 (D.Minn.1996).

Solutech, Inc. v. Solutech Consulting Services, Inc., 153 F.Supp.2d 1082

(E.D.Mo.2000).

IV. The trial court erred as a matter of law in holding in its Memorandum and Order of January 29, 2002, that there was no meeting of the minds between the parties sufficient to create a binding oral contract as of December 13, 2001, concerning settlement of the litigation, and that there was therefore no enforceable agreement, in that the unrefuted record showed that there was a sufficient meeting of the minds to find a binding contract as a matter of law.

Caleshu v. Merrill Lynch, 737 F.Supp. 1070 (E.D.Mo. 1990),

affirmed, 985 F.2d 564 (8th Cir. 1991).

Fiegener v. Freeman-Oak Hill Health System , 996 S.W.2d 767

(Mo.App. S.D.1999).

Promotional Consultants, Inc. v. Logsdon, 25 S.W.3d 501 (Mo.App.E.D.2000).

Worthy v. McKesson Corp., 756 F.2d 1370 (8th Cir. 1985).

STATEMENT OF THE CASE

Plaintiffs/Appellants, Visiting Nurse Association - St. Louis, Visiting Nurse Association of Greater St. Louis f/k/a Visiting Nurse Association Home Health Care, Visiting Nurse Association Hospice Care, and VNA Services Corporation (hereinafter ~~A~~Plaintiffs~~@~~) brought a three-count action in Missouri State Court on October 22, 2001 against Defendants/Appellees VNA Healthcare, Inc., VNA Homecare, Inc. and Visiting Nurses Hospice. The case was removed by defendants to the United States District Court of the Eastern District of Missouri on October 29, 2001. (App. 014) Plaintiffs¹ filed a First Amended Complaint on December 7, 2001, and added as Defendants VNA Privatecare, Inc. and VNA Private Duty, Inc. (App. 069)

The Complaint stated a claim in three counts for violation of common law trade name, unfair competition, and violation of the Missouri Anti-Dilution Statute, §417.061 RSMo (2000). Plaintiffs sought injunctive relief, an accounting of profits using the name, damages derived from those profits, and a surrender of all items bearing the name. (App. 069-084)

¹ Because of the similarity of names of the parties, which is the issue in this case, in order to comply with Federal Rule of Appellate Procedure 28(d), the parties shall be referred to in this Brief as “Plaintiffs” and “Defendants.” References to the Appendix shall be to “App.” followed by the page number. References to the transcript of the hearings shall be to “Vol. I” followed by the page number for the hearing of March 21, 2002, and to “Vol. II” followed by the page number for the hearing of May 8, 2002.

The case was assigned to the Honorable E. Richard Webber, District Court Judge. A request for a preliminary injunction hearing was filed on November 6, 2001. (Document 11, App. 005) A hearing was scheduled for November 28, 2001. (Document 16, App. 005) A Motion to Dismiss was filed by Defendants on November 13, 2001. (Document 19, App. 006) The preliminary hearing was rescheduled by the trial court, sua sponte, for December 6, 2001. (Document 22, App. 006) The preliminary hearing again was rescheduled by the trial court, sua sponte, for December 14, 2001. (Document 24, App. 006) The parties entered into settlement discussions and cancelled the hearing based upon an understanding that the case was settled. Plaintiffs filed a Motion to Enforce Settlement Agreement on January 3, 2002. (App. 085) The trial court denied the Motion to Enforce the Settlement Agreement on January 29, 2002, and rescheduled the preliminary hearing for February 6, 2002. (Document 36, App. 114) On January 31, 2002, the trial court rescheduled the hearing for March 14, 2002, with a back-up date of March 21, 2002. (Document 39, App. 008) On March 7, 2002, the trial court made firm the date of March 21, 2002. (Document 48, App. 009) The hearing was held on March 21, 2002, evidence was heard, and the hearing was continued to April 15, 2002. (Document 50, App. 009; Transcript, Vol. I) On April 16, 2002, the trial court continued the hearing by consent to May 8, 2002. (Document 53, App. 009) On May 8, 2002, the hearing was resumed and the

evidence concluded. (Document 54, App. 009; Transcript, Vol. II) On July 30, 2002, the trial court entered an order denying Plaintiffs' request for a preliminary injunction and denying Defendants' Motion to Dismiss except as to Defendant Visiting Nurses Hospice, which Defendant was dismissed. (App. 133) On October 16, 2002, the parties stipulated that the evidence in a trial on the merits would be the same as previously heard by the trial court, and requested that the trial court consolidate the hearings after the fact pursuant to Federal Rule of Civil Procedure 65(a)(2) and enter a final order, without prejudice to the parties right to appeal. (App. 148) The court entered its final judgment adopting its previous findings of fact and conclusions of law and denying Plaintiffs' request for a permanent injunction on November 16, 2002. (App. 150) This appeal was filed on December 3, 2002. (App. 151)

STATEMENT OF THE FACTS

The evidence at trial revealed the following facts:

The Plaintiff Visiting Nurse Association - St. Louis is a United Way agency providing health care services to the St. Louis Community. As of trial, it provided hospice services, case management services, and community services. (Vol. I, p.7) It is a not-for-profit corporation organized in the State of Missouri. (Vol. I, p. 8) It operates Visiting Nurse Association of Greater St. Louis, previously also known as Visiting Nurse Association Home Healthcare, (Vol. I, pp. 8-9), and Visiting Nurse Association Hospice Care (Vol. I, p.13), which organizations are also Plaintiffs. All of these organizations are not-for-profit, collectively providing service to the Trade Area since 1911. (Vol. I, pp. 7, 12-13, 22) Plaintiffs also formerly also operated VNA Services Corporation (Vol. I, p. 22), nominally a Plaintiff in order to protect its trade name.

In 1998, the Plaintiffs withdrew from the home healthcare business (as opposed to the hospice business or community education and vaccination programs) due to cutbacks in Medicare funding. (Vol. I, p.10) The Plaintiff organizations now operate a Medicare certified and licensed hospice program, which provides services to terminally ill patients who have a life expectancy of six months or less. The services are provided in home or in a nursing facility based upon a doctor's authorization. (Vol. I, p.13) However, terminally ill patients are

seen in home care settings as well as hospice settings. (Vol. I, p.72) There are patients who could be seen as hospice patients who are seen as home health care patients. (Vol. I, pp. 69-72)

While certain of the Plaintiff entities are not currently operating, and while Plaintiffs do not at present provide home healthcare services other than connected to hospice service, Plaintiffs have not foreclosed the possibility of doing so again in the future. (Vol. I, pp.86-87) Plaintiffs at present however do contract for private home healthcare services and private duty care through a joint operating agreement with an independent, unrelated third-party, not the Defendants. (Vol. I, pp. 69-70, 75, 87)

Case Management Consultants, provides catastrophic and disease management to self-insured companies and third-party administrators. (Vol. I, p.14) The Community Services Division of Case Management Consultants operates an annual flu immunization program, a Hepatitis A vaccination program, and an international travel vaccination program. Case Management Consultants is a division of Plaintiff Visiting Nurse Association - St. Louis. (Vol. I, p.17-18)

Plaintiffs have marketed their flu vaccination program on an annual basis for the past ten years throughout the communities in which they operate in Missouri by direct solicitation of corporations and major retail sites. They issue press releases and employ a public relations company which obtains exposure on various

television news programs. (Vol. I, pp.24-25) Articles also appear in the St. Louis Post-Dispatch newspaper, the St. Louis Metropolitan Medicine magazine, and the St. Louis Business Journal. (Vol. I, pp.25-27, 29) Plaintiffs deliver approximately 55,000 flu vaccinations a year in the St. Louis area they serve. (Vol. I, p.30)

Plaintiffs are members of a national organization known as the AVisiting Nurse Association of America.@ (Vol. I, p.50) Members are nonprofit entities providing home care services. (Vol. I, p.51) At one time the number of member organizations was 500. (Vol. I, p.51) Now the number of member organizations is approximately 300. (Vol. I, pp.51, 57-58) None of the organizations using the name AVisiting Nurse Association@or AVNA@actually known to either Plaintiffs or Defendants are for-profit, with the sole exception of Defendants=entities. (Vol. I, p. 58, Vol. II, p.109)

Plaintiffs= offices are located at 9450 Manchester Road, Suite 206, in the City of Rock Hill, St. Louis County, Missouri. (Vol. I, p. 23-24) Plaintiffs operate within the State of Missouri in the counties of St. Louis, St. Charles, Jefferson, Franklin, Washington, St. Francois and St. Genevieve, and in the City of St. Louis. (Vol. I, pp. 19-20)² Within Plaintiffs= Trade Area, no other entity than Plaintiffs= operates using the name of AVisiting Nurse Association@or AVNA,@ with the sole exception of Defendants. (Vol. I, pp.51-52) Plaintiffs have used the names

AVisiting Nurse Association@ and AVNA@ within this trade area exclusively since 1911.

Defendant VNA Homecare, Inc. is an Illinois corporation which has two offices in Missouri providing primarily homecare services. Its Illinois branches provide hospice services, private duty services and home care. Defendant VNA Healthcare, Inc. was a separate entity which Defendants merged into Defendant VNA Homecare, Inc. during the trial of this matter, in March of 2002. (Vol. II, pp. 57-58) At the same time, the Defendants began using the name “VNA-TIP Homecare” as a trade name in Missouri and Illinois without changing their legal names. (Vol. II, pp. 57, 59) Defendants are a for-profit business, which precludes their entry into the Visiting Nurse Association of America, a not-for-profit association. (Vol. II, p. 67) Defendants purchased the companies and the names “VNA Homecare” and “VNA Healthcare” in 1997. At the time, the companies were exclusively in Illinois and previous to Defendants’ acquisition were not-for-profit. (Vol. II, pp. 61, 67-68, 107) Defendants also operate VNA Private Care, Inc. in Missouri to low income patients. (Vol. II, p. 91)

Defendants started doing business in Missouri because referring physicians requested that Defendants see Missouri patients. (Vol. II, p. 73) Defendants started doing business in Missouri in 1998. (Vol. II, p. 74) The second Missouri

² The counties and areas in which Plaintiffs operate shall be referred to

office was opened during the trial of this matter, in April or May of 2002. (Vol. II, p. 79) The first time they received any complaint from Plaintiffs was in 2001. (Vol. II, p. 75)

Defendants provide flu vaccinations in Missouri since 1998, though Missouri constitutes only ten percent (10%) of Defendants' total vaccinations. Defendants testified that Plaintiffs provide flu vaccinations in Illinois. (Vol. II, pp. 84-86)

Defendants decided to open a hospice service in Missouri in 2001. They registered with the State of Missouri to do so. (Vol. II, p. 81) Defendants' president testified that he abandoned the idea when he received a letter from Plaintiffs' counsel objecting. (Vol. II, p. 82)

Defendants ran ads in the local newspaper for their hospice service after receiving approval from the State. (Vol. I, pp. 130-131) They also listed their Missouri Hospice Service on their website, Exhibit 13 (App. 158), but stated that ~~A~~everybody forgot to take them off when we dropped the project.@ (Vol. II, pp. 120-121)

Exhibit 9 (App. 153) was Defendants' application for Hospice registration. It lists counties of Missouri operation including St. Louis City, St. Louis County, St. Charles, Jefferson, Warren and Franklin. (Vol. I, pp. 131-132) There was no

throughout as "Plaintiffs' Trade Area."

evidence presented that this application has been either withdrawn or forfeited, though Defendants' president testified that the application automatically expired after 90 days. (Vol. II, p. 106)

Exhibit 10 (App. 155) is an excerpt from the St. Louis Yellow Pages for October 2001, and shows listings for AVNA Private Duty,@ AVNA Private Care,@ and AVisiting Nurse Hospice, Inc.,@ which all refer to the Defendants= Missouri address and telephone number. (Vol. I, pp. 132-135) The phone for all three listings is answered AVNA Homecare.@ (Vol. I, pp. 132-135)

Defendants operate a web page on the worldwide net of AWWW.vnahealth.com/missouri.@ Exhibit 13 was admitted into evidence showing the web page contents. (Vol. I, p. 136) Exhibit 13 listed an A800" number which answers in Illinois, from which cases are referred to Missouri. (Vol. I, p. 137) The site also listed a toll-free A618" number for Illinois residents that is answered in Missouri. (Vol. I, p. 138) It lists four counties in Missouri in which Defendants operate: Jefferson, St. Charles, St. Louis and St. Louis City. (Vol. I, p. 138)³ In December of 2001, Defendants were listing hospice services as part of the service provided in Missouri. (Vol. II, p. 120)

³ Although Defendants testified that they changed their website between hearings, they produced no evidence of that change. (Vol. II, p. 119)

There was evidence introduced over objection to relevance that the Plaintiffs provided services within Defendants' trade area in Illinois since 1911, but did not believe that such incursion into Illinois was a problem for Plaintiffs. (Vol. I, pp. 66-67) There was also evidence introduced that Plaintiffs and Defendants entered into a joint flu shot program in Illinois in 1999 and that Plaintiffs provided an inservice program to Defendants in 2000. (Vol. I, pp. 72-74; Vol. II, p. 80)

Plaintiffs first became aware of the Defendants operating in Missouri in 1998, when Defendants set up an office in Bridgeton, Missouri. (Vol. I, p. 31) Plaintiffs' president testified that she took no action to stop Defendants' operations in Missouri at that time because Plaintiffs were making a decision to close their home health care agency due to changes in Medicare reimbursement, which cost the Plaintiffs two million dollars (\$2,000,000). This change was a major undertaking for the Plaintiffs. (Vol. I, p. 32) In the year 2000, confusion between Plaintiffs= healthcare services and Defendants= healthcare services first became a serious problem. Plaintiffs began receiving inquiries from corporations calling to confirm that Plaintiffs were going to provide flu clinics at certain corporate sites. Plaintiffs had no knowledge of these arrangements, and had to convince the corporations that Plaintiffs were not servicing those corporations. This was the first time Plaintiffs were aware that Defendants were providing flu vaccinations at corporate sites in Missouri. (Vol. I, pp. 32-33) In 2001, Plaintiffs also first

became aware that Defendants had applied for a license to provide hospice care in Missouri. (Vol. I, pp. 75)

Susan Pettit, President of the Plaintiffs organizations, instructed various members of her staff to document any issues of confusion which they dealt with in their jobs. (Vol. I, pp. 33, 42) The result was Exhibit 28 (App. 182), a compendium of incidents which showed that Plaintiffs business was extremely disrupted by Defendants operations. (Vol. I, pp. 33 - 44)

Deborah Baldwin is a registered nurse who works for Plaintiff Visiting Nurse Hospice Care doing community coordination, liaison and education. (Vol. I, p. 109) She had contact with a nursing home organization called AMcKnight Place@ about flu vaccines which McKnight Place believed Plaintiffs were providing. Ms. Baldwin checked and determined that Plaintiffs were not providing flu vaccines to McKnight Place. (Vol. I, p. 113) The person at McKnight Place with whom Ms. Baldwin spoke was the director of nursing. (Vol. I, p. 126) That person expressed confusion about the entity providing flu shots to McKnight Place. (Vol. I, p. 127) Ms. Baldwin had a similar problem with an organization called AGreen Park Nursing Home.@ (Vol. I, p. 118) The representative from Green Park believed that a representative of Plaintiffs named AMillie@ had been making representations about services. (Vol. I, pp. 118-120) Defendants= president, Gary Liebscher, admitted that Millie worked for Defendants. (Vol. II, p. 112) Defendants=

president also admitted that Millie had advised him that Defendants were providing the flu vaccines to both McKnight Place and Green Park Nursing Home. (Vol. II, p. 113) McKnight Place and Green Park Nursing Home are within Plaintiffs' Trade Area. (Vol. I, p. 112)

Carol Emmerich is a manager of the Hospice Program for the Plaintiffs. (Vol. II, p. 5) She supervises approximately 25 people, including field, office and billing staff. She also communicates with vendors and doctors, and is familiar with all of the activities of the Plaintiff organizations. (Vol. II, pp. 6-7) Ms. Emmerich is familiar with the Defendants and their offices on Bridgeland in Bridgeton, Missouri. (Vol. II, p. 7)⁴ In her job, she has been required to respond to numerous misdirected telephone calls, misdirected mail, misdirected orders from physicians and misdirected bills from the public believing they were doing business with the Plaintiffs when in fact they were doing business with the Defendants. (Vol. II, p. 8)

Ms. Emmerich identified Exhibit 24 (App. 175) as a bill she received from Provider Plus, a provider of durable medical equipment, which consists of five (5) bills dated September 20, 2001, addressed to AVisiting Nurse Hospice, 3445 Bridgeland, Suite 119, St. Louis, MO 63044.@ (Vol. II, p. 8-10) The bills are not for services provided by the Plaintiff organizations. (Vol. II, p. 10) The address is

⁴ The Bridgeland address is within Plaintiff's Trade Area.

Defendants= Missouri business address. (Vol. I, p. 133; Vol. II, p. 117)
Defendants= president, Gary Liebscher, admitted that Defendants do business with
Provider Plus. (Vol. II, p. 116) In spite of this, Defendants deny doing business as
AVisiting Nurse Hospice@ (Vol. II, pp. 90, 96) even though Defendants admit to
registering the name with the State of Missouri. (Vol. I, pp. 130-131)

Ms. Emmerich identified Exhibit 21(App. 169) as an order from a physician
for medication, addressed to Plaintiffs= Manchester Road address, but not for a
patient of the Plaintiffs. It is on a form that Plaintiffs do not use and is addressed
to AVNA Homecare, Inc.,@ a name Plaintiffs do not use. (Vol. II, pp. 12-13) The
patient is a Missouri patient of Defendants. (Vol. II, pp. 98, 115) The form has
Defendants= name on it and is a form Defendants produce. (Vol. II, pp. 115-116)

Ms. Emmerich identified Exhibit 25 (App. 180) as an order from a physician
for chemotherapy addressed to Plaintiffs= Manchester Road address but not for a
patient of the Plaintiffs. (Vol. II, pp. 20-21) The patient is a Missouri patient of
Defendants. (Vol. II, pp. 98-99)

Ms. Emmerich also identified Exhibits 22 (App. 171) and 23 (App. 173) as
not representing Plaintiffs' patients. (Vol. II, pp. 10-12)

Exhibits 17 (App. 167) and 18 (App. 168) represent instances in which Ms.
Emmerich had been confronted by members of the community who mistook
Plaintiffs for Defendants. (Vol. II, pp. 14-19) In addition, members of the staff of

Plaintiffs have complained to Ms. Emmerich about the confusion between Plaintiffs and Defendants. (Vol. II, pp. 17-18) These Exhibits were offered to show confusion and not for the truth of the matter contained in the Exhibits. (Vol. II, pp. 15, 22)

Kathryn Pilkington Fulgham is the manager of the senior services program and lifeline operations at Forest Park Hospital, which is not affiliated with any party to this action. She has been in the healthcare industry for seven years. (Vol. I, pp. 91-92, 103) She testified that she had a personal experience with Defendants, whom she verified by their location and address in Bridgeton, Missouri. (Vol. I, p. 93) She was seeking home health services for an elderly friend. (Vol. I, p. 94) She thought that the elderly friend had been referred to one of the Plaintiffs' organizations. (Vol. I, p. 95) The organization (now known to be Defendants') cast doubt for the elderly woman about the bona fides of a social worker for whom Ms. Fulgham had made arrangements, and whom Ms. Fulgham knew well. The dispute led to the involvement of the Missouri Division of Aging. (Vol. I, p. 98) During the dispute, Ms. Fulgham asked to speak to Donna Newman, an employee of the Plaintiffs, because she believed that the organization she was dealing with was the Plaintiffs'. (Vol. I, p. 99) She was told that Donna Newman did not work for the organization in question and that there was another VNA in town. She determined that she had been dealing all along with the Defendants in Bridgeton.

(Vol. I, pp. 99-100) Defendants brought out on cross-examination, over objection to relevance, that Ms. Fulgham received two complaints directed to the Division of Aging of the State of Missouri concerning her involvement with patients. (Vol. I, P. 105)

Defendants' president testified that there would be a tremendous loss of business from referral sources if he was unable to use the names "Visiting Nurse Association" or "VNA." (Vol. II, p. 101) He also testified that he would incur costs to change the name, and that this cost would be about ten thousand dollars (\$10,000). (Vol. II, p. 102, 119) At the same time, he testified that the bids for vaccinations all come "down to dollars and cents," (Vol. II, p. 113) "the first consideration is the price." (Vol. II, p. 114)

MOTION TO ENFORCE SETTLEMENT

The hearing for preliminary injunction was scheduled by the trial court for Friday, December 14, 2001. On Thursday, December 13, 2001, counsel for Defendants contacted counsel for Plaintiffs with an offer of settlement. (App. 085) The parties had previously discussed settlement but had been unable to agree upon terms. Pursuant to the offer made by counsel for Defendants, numerous telephone conversations ensued throughout the day between counsel, commencing in the morning and concluding at 6:00 p.m. that evening. The terms of the settlement were rather elaborate, and both sides took great pains to insure that they each

understood the terms proposed and accepted by the other, writing those terms down to avoid mistake. Counsel for Plaintiffs maintained handwritten notes of those discussions. (App. 086)

A major issue in the settlement was the name by which each Defendant would continue to operate within the Plaintiffs= Trade Area, as that term was defined in the pleadings. Defendants proposed that the business of what is now known as AVNA HealthCare, Inc.@ would be changed to AVNA-TIP HomeCare@ within the Plaintiffs= Trade Area. Plaintiffs were originally opposed to this change, and wanted Defendants to use a different name. However, after many exchanges, Plaintiffs finally conceded the use of this name on two conditions: (a) the name change would commence January 1, 2002; and (b) on all stationary, literature, business cards, forms and promotional materials used for business within the Plaintiffs= Trade Area, the following information would be used by Defendant AVNA HealthCare, Inc.@: (i) its telephone number; (ii) its facsimile transmission number; and (iii) a disclaimer which shall be legible and read in substantially the following form: AA *for-profit corporation not affiliated with the Visiting Nurse Association of Greater St. Louis.*@ Defendants agreed to these proposals, except that they rejected the disclaimer language, and instead affirmatively proposed to use the language: A*Not affiliated with the Visiting Nurse Association of Greater St. Louis.*@ Defendants affirmatively confirmed that the name change would

commence on January 1, 2002. (App. 086)

Following these discussions, both sides' counsel appeared in Court on Friday, December 14, 2001, at 9:00 a.m., and announced to the Court that a complete settlement had been reached, and that the parties would document the settlement and then submit the appropriate pleadings to the Court. There was no indication that there were terms left to negotiate, nor did counsel for Plaintiffs believe that any such terms were left unresolved. (App. 086-087, 218)

Following the discussion in Court, counsel for the Plaintiffs returned to his office and drafted the Settlement Agreement which was submitted to the trial court with the Motion To Enforce the Settlement Agreement. A draft of this Agreement was forwarded to counsel for the Defendants by facsimile at 3:14 p.m. (App. 087)

On the afternoon of December 14, 2001, prior to receiving the draft Settlement Agreement, counsel for Defendants called counsel for Plaintiffs but did not reach him, and left a telephone mail message raising two new issues: (a) Defendants wished to have 3 months to use all stationary which it had in inventory and did not contain the new language; and (b) Defendants wanted to establish a duration for the use of the disclaimer. Neither of these issues had been discussed on December 13, 2001. Nothing was said concerning the content of the disclaimer. (App. 087)

On Monday, December 17, 2001, counsel for the Defendants left another

telephone mail message, raising these issues again, as well as other issues. This message was attached to the Motion submitted to the trial court. In this message, for the first time the issue of the content of the disclaimer was raised again. (App. 087)

On Tuesday, December 18, 2001, counsel for the Plaintiffs responded by electronic mail message. On Wednesday, December 19, 2001, counsel for Defendants replied by electronic mail message. On Thursday, December 20, 2001, counsel for Plaintiffs again responded by electronic mail message. All of these electronic mail messages were submitted to the trial court. On Friday, December 21, 2001, counsel for the Defendants responded with a telephone mail message also submitted to the trial court. (App. 087-088)

Discussions continued between counsel, but these three issues remained: (a) the content of the disclaimer language; (b) the duration of the use of the disclaimer and of the agreement; and (c) the time in which Defendants may use old stationary. The Plaintiffs argued to the trial court that the first issue was resolved on December 13, 2001 by a proposal from Defendants accepted by Plaintiffs, and that the other issues were never raised until after the Court meeting on December 14, 2001, which was after the agreement terms had been finalized. (App. 088)

Defendants did not seriously contest the facts as set out above, but rather stated that the issues in contention were not discussed and that there was no

meeting of the minds on a material issue. (App. 107) Defendants also argued that the content of the website (referred to in Paragraph 7 of Exhibit A) was not discussed on December 13, 2001. Plaintiffs did not disagree with this last point.

The trial court adopted the above facts concerning the settlement discussions in virtually the identical form as set out above and by the parties. (App. 218-219)

On January 29, 2002, the trial court denied the Motion To Enforce finding that there was no meeting of the minds on settlement. (App. 218-222)

SUMMARY OF THE ARGUMENT

The words “Visiting Nurse Association” and “VNA” are not generic, but rather are descriptive as a matter of law. Defendants admitted so much in their own statements on the record when they testified concerning the credibility and comfort the name provides to referral sources. Under the tests for each of Plaintiffs’ causes of action, as a matter of law these names cannot be deemed generic, particularly since they have a strong secondary meaning in the public mind, and Plaintiffs showed many instances of confusion. “VNA” is even more than descriptive, as it means nothing in general terminology unless applied to Plaintiffs or Defendants.

Plaintiffs are not guilty of laches, as the law is clear that Defendants have the burden of showing that they suffered some prejudice by the delay in bringing this action by undertaking some activity in reliance upon Plaintiffs acquiescence in their intrusion into Plaintiffs’ Trade Area. No evidence was presented on this subject, nor did the trial court make any such finding.

The trial court did find that Plaintiffs presented “considerable evidence” on the issue of likelihood of confusion, and held that the case did not turn on that question, but then went on to hold that as a matter of law Plaintiffs failed to show a likelihood of confusion. The evidence was clear that customers thought services were coming from the same organization, and the trial court so found, but ruled to

the contrary to reach an inconsistent result not supported by the law. Confusion is presumed when the parties provide the same class of services, as here, even if the services are not identical.

Finally, the trial court erred in refusing to enforce the settlement agreement announced to the court by the parties to the trial court on the eve of a setting for the hearing on the preliminary injunction motion. The trial court found the evidence of the agreement to be as stated by Plaintiffs in their Motion To Enforce, but erroneously found that there was not sufficient meeting of the minds to uphold the agreement. The case law is clear that settlement agreements which address all substantial issues should be enforced. The issues which Defendants claimed were not agreed upon were either insubstantial, or intentionally omitted by Defendants, as it could easily be inferred that silence as to duration of an agreement which Defendants had negotiated and modified was intended to mean the duration was perpetual. The trial court's ruling on the law is contrary to its findings of fact, and the settlement should be enforced.

ARGUMENT

STANDARD OF REVIEW

Whether there is a likelihood of confusion is a mixed question of fact and law. *Wynn I*, 839 F.2d at 1186. We apply a clearly erroneous standard to the district court's findings of fact supporting the likelihood of confusion factors, but review *de novo* the legal question of whether those foundational facts constitute a "likelihood of confusion." *Id.* (citing *Frisch's Restaurant, Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1264 (6th Cir.1985) (*Frisch's II*)). This standard of review applies both to a mark infringement claim and an unfair competition claim. *Wynn Oil Co. v. American Way Service Corp.*, 943 F.2d 595, 604 (6th Cir.1991) (*Wynn II*).

Champions Golf Club, Inc. v. The Champions Golf Club, Inc., 78 F.3d 1111, 1116 (6th Cir. 1996). Questions of state law are also reviewed *de novo*. Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1180 (9th Cir.1988).

I. The trial court erred as a matter of law in determining that the terms AVisiting Nurse Association® and “VNA” are generic marks not entitled to trade name protection rather than descriptive marks identifying Plaintiffs to

consumers because the evidence demonstrated at trial, and Defendants admitted, that the term AVisiting Nurse Association® is descriptive in that it tells something about the service provided by Plaintiffs, and “VNA” is fanciful, both having been utilized continuously by Plaintiffs in the Trade Area for over ninety years, so that they now clearly identify Plaintiffs in Plaintiffs’ Trade Area.

A trademark is generally any word, name, symbol, or device adopted and used by a merchant to identify its goods and distinguish them from those sold by others. Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc., 758 F.Supp. 512, 521 (E.D.Mo. 1991). In an action for trademark infringement, whether common law or statutory, a plaintiff must establish two essential elements: (1) ownership of a distinctive mark or name, and (2) defendant’s use of similar mark or name is likely to cause confusion as to the source of the products sold by defendant. Id.

In order to claim ownership of a distinctive name, a plaintiff must demonstrate that its use of the name has been of such quality and for such a duration that it has come to identify goods bearing the name as originating from that party. Id. at 522. The plaintiff must demonstrate its rights in the name through long, continuous use, extensive advertising, and public acceptance of the name. Id. When these factors combine to cause an association by consumers of a name with

certain goods, distinguishing them from other goods, the name has acquired a secondary meaning. Id. That secondary meaning is entitled to protection by the courts. Id. The exclusive right to use the name belongs to the first person who appropriates it and uses it in connection with a particular business. Id. Any doubts as to confusion are to be decided against the newcomer. Id. Furthermore, the ownership of a trade name is acquired by use, not by registration. Id. The right to use a trade name is unaffected by failure to register. Id.

Whether a name is entitled to trademark protection is initially analyzed by categorizing the mark as either: (1) generic, (2) descriptive, (3) suggestive, or (4) arbitrary or fanciful. Id. Trademarks that are fictitious, arbitrary or fanciful are generally inherently distinctive. Id. These trade names are afforded the widest ambit of protection and do not require proof of secondary meaning. Suggestive trademarks subtly connote something about the service or product. Id. Although not as strong as a fictitious trademark, a suggestive trade name will be protected without proof of secondary meaning. Id. Descriptive trademarks tell something about the product. Id. Descriptive names are protected when secondary meaning is shown. Id. The last category is generic terms which communicate information about the nature or class of an article or service. Id. A generic term is not entitled to trademark protection. Id.

The lines of demarcation between the four trademark categories are often blurred. Clipper Cruise Line, Inc. v. Star Clippers, Inc., 952 F.2d 1046 (8th Cir. 1992). A term that is generic for one particular product may well be arbitrary for another. Id., citing, A.J. Canfield Co. v. Vess Beverages, Inc., 796 F.2d 903, 906 (7th Cir. 1986). For example, a *combination* of generic or ordinary words combined in a way that describes a product's features, qualities or ingredients in ordinary language or describes the use to which a product is put can be entitled to trade name protection as a descriptive mark if it has acquired secondary meaning. Home Builders Association of Greater St. Louis v. L & L Exhibition Management, Inc., 226 F.3d 944 (8th Cir. 2000); Genesee Brewing Co., Inc. v. Stroh Brewing Co., 124 F.3d 137 (2nd Cir. 1997).

Whether the use of a particular trade name is likely to cause confusion turns on an analysis of several factors set out in SquirtCo v. Seven-Up Co., 628 F.2d 1986, 1091 (8th Cir. 1980). Id. The factors are (1) the similarity of the names; (2) the degree to which the products compete with each other; (3) class of and degree of care likely to be exercised by prospective purchasers; (4) evidence of actual confusion; (5) defendant's intent in adopting the name; and (6) the strength of plaintiff's name. Id. Numerous factors may be weighed in determining whether there is a likelihood of confusion and no one factor is dispositive in reaching that conclusion. Id.

Names need not be identical in order to deceive the public. Id. A[S]imilarity will deceive almost as much as precise identity. Nice and careful discrimination between names cannot be expected from a busy public.@ Id. The use of different or modifying words is not considered sufficient to dispel the likelihood of confusion when the most prominent word in the names appears in both. Id.

Plaintiffs= trade names AVisiting Nurse@ is descriptive because it tells something about the service provided by Plaintiffs. The name informs the consumer that Plaintiffs provide nursing services at various locations at the convenience of the consumer. The designation “VNA” is not generic in any sense. It has no meaning in the English lexicon. It only refers to Plaintiffs in the Plaintiffs’ Trade Area before the incursion of Defendants, and Defendants were well aware of this. To hold the term “VNA” to be generic defies the very term “generic.” “VNA” is, in fact, an arbitrary or suggestive term.

Plaintiffs have continuously utilized the trade names in Plaintiffs= Trade Area without competition for over ninety years. Over the years, the public has come to accept these names, associate the names exclusively with Plaintiffs and Plaintiffs= Services, and has come to distinguish Plaintiffs= Services from other similar services. Therefore, the trade names AVisiting Nurse@ and AVNA@ have acquired secondary meaning within Plaintiffs’ Trade Area and are entitled to protection by this Court.

Defendants' use of the names AVNA® and AVisiting Nurse® within Plaintiffs' Trade Area is likely to cause confusion - and in fact has already caused confusion - for the following reasons. First, the names are identical to the names used by Plaintiff. Second, the health care services provided by Plaintiff and Defendant are similar (if not identical) and the customer base is identical. The parties therefore compete, at least in some services. (See, Point III, below) Third, prospective purchasers will need to exercise a high degree of care in order to distinguish between the Plaintiffs and Defendants. The similarity of the names is so strong that even customers like Ms. Fulgham who are very familiar with either entity could easily confuse the two. Fifth, Defendants intended to confuse and deceive the public when they chose their names. The Defendants' president admitted that trading on Plaintiffs' name was important to his referral sources. Finally, Plaintiffs' long, continuous use of the trade names AVisiting Nurse® and AVNA® within Plaintiffs' Trade Area and the public acceptance of the trade names has resulted in strong trade names.

While the words "visiting," "nurse" and "association" may well be generic when standing alone, the combination of the words takes on a descriptive meaning well beyond the generic implications of the separate terms; it describes a very well known not-for-profit organization in the Plaintiffs' Trade Area operating for over ninety years. This very Court has made a similar finding in a similar situation.

Some trade show names used by HBA in the past, such as "The Home Show" or "The St. Louis Home Show," might well be generic when applied to this type of show. *See Genesee Brewing*, 124 F.3d at 147 (a mark is generic when applied to services "that require the use of the mark in order to convey their nature to the consumer"). But the names HBA now uses, "The St. Louis Builders Home and Garden Show," and "The St. Louis Builders Home and Remodeling Show," are descriptive. They describe the characteristics of the shows, but they also identify the sponsor or source in a way that leaves competitors free to adopt other names that are equally descriptive but not inherently confusing.

Home Builders Ass'n of Greater St. Louis v. L&L Exhibition Management, Inc. , 226 F.3d 944, 949 (8th Cir. banc 2000). This is a finding under the Lanham Act, but would have the same result in common law trade name cases. The court's analysis with respect to trademark infringement under Missouri law is the same as under federal law. Ethex Corp. v. First Horizon Pharmaceutical Corp. , 228 F.Supp.2d 1048, 1058 (E.D.Mo.2002).

Defendants' president admitted that the name was more than generic in his deposition testimony, read into evidence at trial.

The VNA name has a lot of pull, and it gives physicians a lot of comfort because they recognize that people who operate under that name have a certain quality ethic and they go that extra step in order to provide the better care for the patients. It's an intangible that's hard to describe, but it's there, and many of - - we have a lot of foreign doctors that refer to us, and these doctors believe in the VNA name. They don't know much about the United States and different names, but they recognize VNA because there are some 500 different VNA's in the country, and they went to med school and they went through the internship. The VNA was always a name that they felt comfortable with.

(Vol. I, pp. 141-142) This statement is hardly a description of a generic name under any definition of the word.

These facts also support Plaintiffs claim for unfair competition by demonstrating the essential lack of fair play by Defendants. Unfair competition is established by showing one party is passing off its product as that of another so that the public is deceived regarding the source of the goods. Gilbert/Robinson, Inc., supra, 758 F.Supp. at 527. Proof of deceitful intent is not a necessary element of the tort of unfair competition. Id. In other words, a party can engage in unfair competition even though it does not possess intent. Id. The same facts which

support a suit for trademark infringement will support a suit for unfair competition. Id. However, a suit for unfair competition provides broader protection than a traditional suit for trademark infringement.

Numerous state and federal cases have held that a generic term not qualifying as a trademark *per se* can still be proprietary and protected through an action for unfair competition if the term has acquired secondary meaning. Bagby v. Blackwell, 211 S.W.2d 69 (Mo. App. 1948); Better Business Bureau of Kansas City Advertising Club v. Chappel, 307 S.W.2d 510 (Mo. App. 1957); Gilbert/Robinson, Inc., *supra*, 758 F.Supp. at 527.

In Better Business Bureau of Kansas City, the Plaintiff, Better Business Bureau of Kansas City, sought to enjoin the defendant, Better Business Association, from utilizing the name ABetter Business® within the greater Kansas City area. Better Business Bureau of Kansas City, *supra*, 307 S.W.2d at 510. Plaintiff had been conducting business in the Kansas City area as a benevolent corporation utilizing the name Better Business Bureau for over twenty-five years when defendant began operating a for-profit corporation utilizing the name Better Business Association. Id. Plaintiff filed suit against defendant alleging unfair competition. Id. The court explained that unfair competition aims to effect honesty among competitors by outlawing all attempts to trade on another's reputation thereby protecting the public from deception. Id. at 514. The court held

that even a name that is generic and not capable of exclusive appropriation as a trademark may be protected against unfair competition if the name has acquired secondary meaning:

The law is well settled that words or names which are generic or descriptive, and thus probably not capable of exclusive appropriation as a technical trade-mark may nevertheless by long use in connection with the goods, services or business of a particular person or entity come to be understood by the public as designating the goods, services or business of that particular person or entity, and thus acquire a secondary meaning in the public mind which may be protected against unfair competition.

Id. at 515.

The Missouri court further held that rights in a trade name will be recognized more readily when the infringing name embodies the distinctive part of the owner's corporate name. Id. A person, firm or corporation coming into a field already occupied by another of established reputation must do nothing which will unnecessarily create or cause confusion between his goods, services or business and the goods, services or business of the other person. Id. Anything that unnecessarily creates or increases this confusion and damage to the established person or entity may constitute unfair competition. Id. The court found that the

defendant's acts constituted unfair competition and enjoined defendant from utilizing the name Better Business Association in the Kansas City area. Id. at 516.

The Ohio Court of Appeals reached a similar conclusion in Visiting Nurse Society of Central Stark County, Inc. et al. v. All-Ohio Home Health Care, Inc. et al., 1983 WL 5653 (Ohio App. 5 Dist. 1983). In that case, the Plaintiffs (two not-for-profit Visiting Nurse Associations) sought to enjoin Defendants (two for-profit corporations) from utilizing the name "Visiting Nurse" within Plaintiffs' trade areas under the Ohio Deceptive Trade Practices Act. One Plaintiff had utilized the name "Visiting Nurse" for over seventy years and the other Plaintiff had utilized it for over thirty-five years when the Defendants began to operate within the trade area utilizing the same name. Id. at 2. The lower court enjoined Defendants from utilizing the name "Visiting Nurse" and Defendants appealed.

The appellate court found the Defendants guilty of a deceptive trade practice and upheld that lower court's injunction. The court determined that Plaintiffs' use of the term "Visiting Nurse" had acquired a secondary meaning so as to impel the conclusion that a subsequent user of the term was guilty of a Deceptive Trade Practice and enjoined from use of the term. Id. at 4-6. The court found that the Plaintiffs were entitled to the injunction because: (1) they had established prior use of the term; (2) the term had acquired secondary meaning within their trade area;

and (3) the use of the term by the Defendants created a likelihood of confusion or misunderstanding as to the source of the services. Id.

This Court should note that the Ohio Court of Appeals initially determined that the Plaintiffs had no *per se* proprietary interest in the term **AVisiting Nurse®**. Id. at 3-4. The court reasoned that the term was generic and pointed out that there were at least twenty organizations in the state of Ohio that utilized the term **AVisiting Nurse®** and five different agencies in Plaintiffs' specific geographic area that utilized the term. Id. The existence of numerous agencies utilizing the term **AVisiting Nurse®** within Ohio Plaintiffs' trade area makes the case at bar an even stronger case than Visiting Nurse Society of Central Stark County, Inc. Plaintiff Visiting Nurse Association - St. Louis and the remaining related Plaintiffs historically have been the only entities utilizing the names **AVisiting Nurse®** and **AVNA®** within their trade area. Plaintiffs have continuously used the names within their Trade Area for over ninety years.

The Plaintiffs also made a submissible case for relief under the Missouri Anti-Dilution Statute, Section 417.061, RSMo (2000). The gravamen of a dilution complaint is that the continuing use of a mark similar to plaintiff's mark will inevitably have an adverse effect upon the value of plaintiff's mark and, if plaintiff is powerless to prevent such use, the plaintiff's mark eventually will be deprived of all distinctiveness. Gilbert/Robinson, Inc., 758 F.Supp. at 527. Missouri's anti-

dilution statutes provides that the A[l]ikelihood of injury to business reputation or of dilution of the distinctive quality of a ... trade name valid at common law ... shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of the goods or services.@ Section 417.061. The Missouri anti-dilution statute provides that a violation of the statute will result in an automatic injunction. Id. This suggests an even lower threshold for Plaintiffs to overcome that the common law or unfair competition standards. Plaintiffs believe they more than adequately met their burden.

It is Plaintiffs= position that they do have a proprietary interest in the names AVisiting Nurse@ and AVNA@ within their specific Trade Area well beyond the generic, and that the name “VNA” is even much more than descriptive. The trial court erred as a matter of law in finding to the contrary (App.), and this Court, in its de novo review, should hold that the trial court decision should be reversed.

II. The trial court erred as a matter of law in determining that the doctrine of laches operated to preclude Plaintiffs' request for preliminary injunction in that the result is clearly erroneous, being unsupported by the record, since Defendants failed to present any evidence of prejudice, which is a requirement to meet their burden for this affirmative defense.

The trial court held that Plaintiffs were guilty of laches by waiting almost three years between the time they became aware the existence of Defendants and the time they filed their suit for injunction (Preliminary Order, pp. 7-8, App.). This holding ignored the admitted fact established by the evidence that the confusion over Plaintiffs' and Defendants' names was not apparent until 2000 and 2001 due to new activity of the Defendants in the Plaintiffs' Trade Area. More importantly, since Defendants had the burden on this issue of laches, as it was an affirmative defense they raised, it is clear that Defendants failed to meet their burden by failing to prove prejudice as defined in laches case law.

To invoke the doctrine of laches, defendants have the heavy burden of showing prejudice because of delay as well as the inexcusable character of delay. The mere passage of time is not sufficient to constitute laches. Defendants must show that it relied upon plaintiff's

knowledge or notice of its infringing activities and so changed its position that it would now be inequitable for the court to enforce plaintiff's rights in its trademark. *Armstrong*, 434 F.Supp. at 872.

It is only where the delay is so prolonged and inexcusable that it amounts to a virtual abandonment of the right by plaintiff for a long period of time that the balance of the equities would favor the knowing infringer. *Tisch Hotels*, 350 F.2d at 615.

Although unreasonable delay may bar injunctive relief, the defense of laches is reserved for those rare cases where a protracted acquiescence by plaintiff induces defendants to undertake activities in reliance on the acquiescence. *Rand*, 537 F.Supp. at 594.

Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc., 758 F.Supp. 512, 525 - 526 (E.D.Mo.1991), (Limbaugh, J.). Two elements must be satisfied to apply the doctrine of laches: 1) unreasonable delay in filing suit; and 2) undue prejudice to a defendant caused by said delay. Hurst v. United States Postal Service, 586 F.2d 1197, 1199 (8th Cir.1978). In the case at bar, neither element was supported by the record of the evidence below, nor by the findings of the trial court. While Defendants presented evidence of damage they might have suffered if an injunction were issued, this is not the test. The test is what damage Defendants already suffered as a result of activities undertaken in reliance on Plaintiffs' delay.

Indeed, this element of prejudice was not even discussed by the trial court or Defendants in their presentation of evidence.

There are only two (2) types of prejudice that will support a claim of laches: "(1) loss of evidence which would support defendant's position and (2) change of position in a way that would not have occurred but for the delay." Midwest Petroleum Co. vs. American Petrofina, Inc., 603 F. Supp. 1099, 1113 (E.D.Mo. 1985) (citations omitted). There was absolutely no evidence of either kind of prejudice in the case at bar.

"Mere delay in bringing suit ordinarily does not affect the right to an injunction against further use of an infringed trademark." Electronic Communications, Inc. v. Electronic Components for Industry Co., 443 F.2d 487, 490 (8th Cir.1971). Defendants cannot show anything more than delay, nor did the trial court make any such finding. As a result, the decision below is both clearly erroneous and without support to withstand a *de novo* review.

This Court has also held that unfair competition claims are not barred by the doctrine of laches. In a case where the Court found that the full extent of the infringing activities was not known by plaintiff until shortly before the commencement of this lawsuit, the defense of laches did not apply, and injunctive relief was appropriate. Siegerist v. Blaw-Knox Co., 414 F.2d 375, 383 (8th Cir. 1969). Here, when the full extent of the infringing activity was discovered,

counsel for Plaintiffs made a demand to cease and desist, as admitted by Defendants.

In a case where the action was brought eighteen months after appellants' first use and soon after appellants began openly advertising, this Court found that there was no lack of due diligence by plaintiff in bringing its claim and laches did not apply. Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc., 633 F.2d 746, 754 (8th Cir.1980).

It is clear here that the defense of laches is both inappropriate and not supported by any part of the record. As a result, since the question is one of law, the ruling of the trial court that laches prevented Plaintiffs' from obtaining relief should be reversed.

III. The trial court erred as a matter of law in determining that the likelihood of confusion was not sufficient to warrant the issuance of a preliminary or permanent injunction because the finding was internally inconsistent on its face and against the weight of the trial court's finding that Plaintiffs presented considerable evidence of confusion.

As explained above, the names **AVisiting Nurse@** and **AVNA@** are descriptive of Plaintiff's services and have acquired a secondary meaning in Plaintiffs' Trade Area, thereby entitling Plaintiffs to trade name protection.

This factor [whether a descriptive mark has acquired a secondary meaning] admits of three possible scenarios: (1) cases in which the services of the parties are in direct competition, "in which case confusion is likely if the marks are sufficiently similar"; (2) cases in which the "services are somewhat related but not competitive, so that likelihood of confusion may or may not result depending on other factors"; and (3) cases in which the "services are totally unrelated, in which case confusion is unlikely." *Homeowners*, 931 F.2d at 1108. Services "are 'related' if the services are marketed and consumed such that buyers are likely to believe that the services, similarly marked,

come from the same source, or are somehow connected with or sponsored by a common company." *Id.* at 1109.

Champions Golf Club, Inc. v. The Champions Golf Club, Inc., 78 F.3d 1111, 1118 (6th Cir. 1996). Plaintiffs believe that the evidence as found by the trial court clearly showed that there is direct competition as the services of hospice care and home health care overlap, yet even if this Court were to discount that finding, it is clear that the services are related enough if not competitive so that likelihood of confusion has resulted, as buyers believe the services are coming from the same source.

The trial court held in its Preliminary Order, made final in its Final Judgment, that because Plaintiffs were not currently in the business of home health services, but only in hospice and case management services, there was no likelihood of confusion. (App. 231)

Given the fact that there is little overlap in the services provided by the Plaintiffs and Defendants, the likelihood of confusion is not sufficient to warrant issuance of a preliminary injunction.

(App. 231) This finding is erroneous because (1) it is in direct conflict with a finding of the trial court during trial and earlier in its opinion, and (2) it misstates the law, as actual confusion (services overlap) is not the test, but rather likelihood of confusion.

During the trial, there was much discussion of the overlap between hospice services and home health services. At one point during the first day of trial, the trial court made the following finding:

THE COURT: Well, as I understand her testimony is that plaintiffs are providing hospice care. That it's also possible to and in fact it is true that home health care providers also provide for terminally ill patients. So I can see where while plaintiffs would be providing only hospice care and defendants would be providing also for terminally ill patients, there could be this competition.

(T. I, p 76, lines 6-12) This is a direct finding of the trial court during the trial which affected how the parties presented their evidence; Plaintiffs at least relying on the fact that the trial court had made this pronouncement, and that the issue of competition was established on the record. The trial court's later opinion is in direct conflict with this finding.

This Court should not assume that the trial court later changed its mind about the evidence. First, there was no reason presented to do so, except to arrive at a desired result. Second, the trial court stated to the contrary in its own opinion.

Footnote 1 There was considerable evidence presented by Plaintiffs on the issue of confusion. . . .

Other evidence was presented on the issue of confusion.

Ultimately, however, whether or not confusion existed is not determinative. The question before the Court that can be resolved without extensive factual findings is whether the term “Visiting Nurses (sic) Association” is a mark entitled to protection, and whether the doctrine of laches should operate to preclude the issuance of a preliminary injunction . . .

(App. 225, footnote 1) It is clear from this lengthy footnote that the trial court still believed there was confusion, but felt that other considerations prevented granting injunctive relief. As shown in Points I and II above, the trial court was mistaken. However, in spite of its repeated pronouncements finding competition and confusion, the trial court then went on in its conclusions of law to take a contrary point of view, unsupported by the evidence as the trial court believed it to have been presented.

Since Plaintiffs were seeking injunctive relief, the trial court also misapplied the law by requiring, as cited above, actual confusion to exist before injunctive relief could be granted. While the trial court used the term “likelihood of confusion,” it is clear from the context and semantics in which it is used that the trial court applied an actual confusion test when it required actual competition.

A complaining party's burden is, in part, dependent upon the relief that it seeks. A plaintiff who wishes to recover money damages for a violation under the Lanham Act and under related State Statutes, must prove that the defendant's violation caused actual confusion among the consumers of the plaintiff's product and, as a result of this consumer confusion, the plaintiff suffered actual injury, such as a loss of sales, profits, or of present value. *Resource Developers, Inc. v. Statue of Liberty-Ellis Island*, 926 F.2d 134, 139 (2nd Cir.1991); *Web Printing Controls Co., Inc. v. Oxy-Dry Corp.*, 906 F.2d 1202, 1204-05 (7th Cir.1990); *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, supra at 271-72. When a plaintiff seeks only injunctive relief, however, it need only prove a likelihood of confusion among consumers that has resulted from the defendant's violation. *Resource Developers, Inc. v. Statue of Liberty-Ellis Island*, supra; *Web Printing Controls Co., Inc. v. Oxy-Dry Corp.*; *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, supra at 271; cf., *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746, 753 (8th Cir.1980) (holding that a plaintiff in a Lanham Act trademark violation action must demonstrate that the defendant's violation tended to deceive consumers).

LensCrafters, Inc. v. Vision World, Inc., 943 F.Supp.1481, 1489 -1490

(D.Minn.1996).

There is no question here that the Defendants tended to deceive consumers, given the “considerable evidence” found by the trial court that consumers believed Defendants were Plaintiffs. The trial court ignored the evidence, admitted by Defendants own president, that local St. Louis nursing homes within Plaintiffs Trade Area thought Plaintiffs were providing vaccination services when indeed they had contracted with Defendants. No more than this single incident should have been required to show likelihood, but there was other evidence as well. There was the testimony of Ms. Fulgham that she believed she was dealing with Plaintiffs in a quite negative way when she was in fact dealing with Defendants. There was the testimony of Mr. Liebscher, Defendants’ president, that he wanted to use the name because doctors in this area recognized it, and had faith in it because of its reputation, and reputation of the Plaintiffs which Mr. Liebscher wished to trade upon.

When identical marks are used in the same geographic area for the same class of goods or services, likelihood of confusion is presumed. Solutech, Inc. v. Solutech Consulting Services, Inc., 153 F.Supp.2d 1082,1088 (E.D.Mo.2000). A[S]imilarity will deceive almost as much as precise identity. Nice and careful discrimination between names cannot be expected from a busy public.@

Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc., 758 F.Supp. 512, 523 (E.D.Mo. 1991). While there may be a distinction between hospice services and home health care services, they are clearly within the same class of services. Confusion therefore should be presumed.

Given this “considerable evidence,” even under a standard of clearly erroneous, this Court must reverse the trial court decision, as the result is contrary to the very findings of the trial court. When this Court reviews *de novo* the legal question of whether those foundational facts constitute a “likelihood of confusion,” reversal of the trial court decision is inescapable.

IV. The trial court erred as a matter of law in holding in its Memorandum and Order of January 29, 2002, that there was no meeting of the minds between the parties sufficient to create a binding oral contract as of December 13, 2001, concerning settlement of the litigation, and that there was therefore no enforceable agreement, in that the unrefuted record showed that there was a sufficient meeting of the minds to find a binding contract as a matter of law.

STANDARD OF REVIEW

In reviewing a ruling on enforcing a settlement agreement, this Court reviews the factual findings of the district court under a clearly erroneous standard and its interpretation of the Settlement Agreement *de novo*. Little Rock School Dist. v. North Little Rock School Dist., 109 F.3d 514, 516 (8th Cir. 1997).

The trial court found that the facts underlying the settlement agreement were not in dispute. (App. 218) There was no dispute as to the core terms of the agreement as found by the trial court, including the inclusion of the disclaimer: “Not affiliated with the Visiting Nurse Association of Greater St. Louis.” (App. 219) After announcing the settlement to the trial court, and the initial drafting of the agreement by Plaintiffs’ counsel, Defendants counsel, before receiving the draft, called to address two additional issues: the time allowed to use all existing stationary without the disclaimer, and the time duration for use of the disclaimer. (App. 219) The trial court refused to enforce the agreement because it found that there was no meeting of the minds sufficient to create a binding contract, because the issues of the duration of the agreement, the scope of use of the disclaimer language and the effective date of the agreement were not mere ancillary issues. (App. 221)⁵ The trial court’s finding misstates the law on these issues.

⁵ The trial court did not rule on the issue raised by Defendants on the statute of frauds. (App. 221-222, footnote 2)

This Court and Missouri courts have repeatedly stated the law on this issue. Settlement agreements are favored by the courts. Caleshu v. Merrill Lynch, 737 F.Supp. 1070, 1086 (E.D.Mo. 1990), *affirmed*, 985 F.2d 564 (8th Cir. 1991). Once parties have settled a dispute and have agreed to settlement terms, the parties cannot rescind the settlement agreement. Id. An oral settlement agreement can be valid and enforceable, even if it contemplates a written release being signed at a later date. Byrd v. Liesman, 825 S.W.2d 38 (Mo. App. S.D. 1992). The parties to a voluntary settlement agreement cannot avoid the agreement simply because the agreement ultimately proves to be disadvantageous. Worthy v. McKesson Corp., 756 F.2d 1370, 1373 (8th Cir. 1985).

In order to determine whether the parties intended to be bound by the settlement prior to the execution of written documents, a court must consider the course of the negotiations, agreement on material terms, whether the parties described the agreement as a settlement, and whether any existing disagreements were merely technicalities. Caleshu, 737 F.Supp. at 1086. A settlement agreement will still be valid, even if the parties leave insubstantial matters for later negotiation. Worthy, 756 F.2d 1373. The question then becomes whether the term of the agreement and the scope of the use of the disclaimer were either implied in the earlier discussion or insubstantial matters.

In Worthy, the parties orally agreed to a settlement, ceased discovery and trial preparations, and requested that the court remove the matter from the trial docket. Worthy, 756 F.2d at 1372. Before the settlement agreement was reduced to writing, the Plaintiff contacted different counsel and advised the Defendant that he no longer wanted to settle because the settlement figure was too low. Id. The Plaintiff refused to sign the written settlement agreement presented by the Defendant, and Defendant filed a motion to enforce the settlement agreement. The District Court enforced the settlement agreement and the Court of Appeals upheld that decision. Id.

This Court explained in Worthy that a party cannot rescind an otherwise voluntary settlement agreement because he later determines that the agreement is disadvantageous. Id., at 1373. A party who later changes his mind regarding settlement is bound by the terms of the agreement. Id.

The Plaintiff in Worthy further argued that there was no mutual assent to the settlement agreement because the written agreement presented by the Defendant contained several terms with which he had not previously agreed. Id. The terms included a covenant that Plaintiff would not seek re-employment with the Defendant, a covenant that Plaintiff would not disclose the terms of the agreement to other employees of Defendant and a general release of claims. Id. The Court held that these additional terms are not so significant that they can be used to

abrogate the agreement. The fact that the parties left insubstantial matters for later negotiation does not vitiate the validity of the agreement reached.@ Id.

The facts of the instant case are comparable to Worthy. The Plaintiffs and Defendants reached a settlement agreement the evening of Thursday, December 13, 2001, the night before the scheduled Preliminary Injunction. Counsel appeared before the Court the following morning and advised the trial court without reservation that a complete settlement had been reached and indicated that later pleadings would be filed regarding the same.

At that point a settlement agreement had been reached. Implied in the terms of the agreement were the terms that the agreement would be valid as long as the Defendants did business in the Plaintiff's Trade Area, and that the use of the disclaimer on all stationary would begin January 1, 2002. This can be discerned from the finding of the trial court that the name change was effective January 1, 2002, and Defendants were to include the disclaimer on all materials. (App. 219) Silence as to any other starting time or duration implied the immediate start and permanent duration. Only over the course of the next several days did Defendants raise several new issues with Plaintiffs and sought to alter the terms of the previously agreed upon settlement.

It would appear that upon reflection Defendants determined that they had reached a settlement that was disadvantageous (or not as advantageous as they

would have liked) and refused to sign the settlement agreement provided by Plaintiffs. These new matters are either insignificant facts to the Defendants, because they were not raised previously, or were understood by implication. Such issues are no less significant to be used to abrogate an agreement than a non-competition clause and a non-disclosure clause. The case law clearly provides that Defendants cannot seek to rescind the valid settlement agreement.

Defendants argument below that failure to raise these issues means they were not resolved is not supported by the law. The court in Worthy explains that the fact that the parties leave insubstantial matters for later negotiation does not vitiate the validity of the settlement agreement reached. Reducing an oral settlement agreement to writing will always involve some effort and discussion between counsel. When the parties reduce an oral settlement agreement to writing they are doing just that **B** putting down the agreement they have already reached in written form. The trial court took the incorrect position that the process of reducing the settlement agreement to writing gives the parties an opportunity to present new issues and demands and that if these new issues and demands cannot be resolved the settlement agreement previously reached is not valid. This argument simply is not supported by the law.

The trial court relied in part upon MIF Realty L.P. v. Rochester Assocs. 92 F.3d 752, 756 (8th Cir. 1996). MIF Realty did not deal with a motion to enforce a

settlement agreement but rather a Rule 60(b) motion to set aside a judgment. The parties represented to the court they had reached an oral settlement agreement *that would be binding* when reduced to writing. Id. at 754 (emphasis supplied). The court dismissed the case based upon the representation but left the matter open for sixty days in which time either party could move to re-open the case. The parties traded numerous settlement drafts and were never able to reduce the settlement to writing. After the expiration of the sixty day period, Plaintiff moved to set aside the dismissal arguing that the case had been dismissed upon the mistaken belief that the parties had reached a settlement. Neither party sought to enforce the oral settlement agreement. The district court denied the Rule 60(b) motion because it concluded that the parties had in fact reached a settlement. This Court overruled the lower court's decision as clearly erroneous in light of the fact that: (a) the parties initially represented to the court that the settlement agreement would only be binding once it was written, (b) the parties were never able to reduce the settlement agreement to writing, and (c) neither party claimed now they had reached a settlement agreement at any time. Id.

Here, the parties advised the trial court that a settlement agreement had been reached without reservation. "[a]ny reservation or limitation as to the scope of a settlement agreement must be clearly expressed." Liquidation of Professional Medical Ins. Co. v. Lakin , 88 S.W.3d 471, 478 (Mo.App.W.D.2002); Promotional

Consultants, Inc. v. Logsdon, 25 S.W.3d 501, 505 (Mo.App.E.D.2000). If the Defendants wished to bargain for a limitation as to the duration of the settlement terms, they should have bargained for such a limitation before they stated to the trial court and Plaintiffs' counsel that an agreement had been reached. Id.

In Missouri, courts look to the parties' *objective* manifestations of intent to determine whether there was a "meeting of the minds."

McDaniel v. Park Place Care Center, Inc., 918 S.W.2d 820, 827[15] (Mo.App.1996). "A person's subjective intent is irrelevant." *Id.*

Fiegener v. Freeman-Oak Hill Health System, 996 S.W.2d 767, 771 (Mo.App. S.D.1999). Here it is clear that the objective manifestation was that an agreement had been reached without reservation. The agreement should be enforced.

While the trial court did not rule on the issue, the Defendants argued that the settlement agreement is subject to the Statute of Frauds and must be in writing because it cannot be performed within one year. They claimed that the alleged agreement would require Defendants to print the disclaimer language (and take other actions) into perpetuity and therefore cannot be performed within one year. A contract is not unenforceable under the Statute of Frauds if it could possibly be performed in compliance with its terms within one year, even though the actual performance is expected to continue over a much longer period. Crabb v. Mid-American Dairymen, Inc., 735 S.W.2d 714 (Mo.banc1987). According to the

settlement agreement, the Defendants are only required to utilize the disclaimer language (and take other actions) as long as they are actively doing business within Plaintiffs= Trade Area. The Defendants have the option of terminating their business within Plaintiffs= Trade Area at any time. Defendants could choose to stop operations within Plaintiffs= Trade Area this week or any time within the next year. Therefore, it is possible that the agreement could be fully performed within one year and the Statute of Frauds does not apply.

The trial court's finding that the parties had not reached a meeting of the minds is not supported by the trial court's own finding that the substantial terms of the agreement had been identified and agreed upon. The decision refusing to enforce the settlement agreement cannot be supported by the case law on this subject, and this Court should reverse the decision of the trial court and reinstate the settlement agreement as established in the trial court's Memorandum and Order, and as drafted by counsel for Plaintiffs.

CONCLUSION

Plaintiffs are affiliates of a long-standing not-for-profit agency, the Visiting Nurse Association of Greater St. Louis, which is familiarly known in its Trade Area as “VNA.” Defendants deliberately entered into this Trade Area as a newcomer in 1998 using the name “VNA” because it knew the name had intrinsic value to the consumer and medical community. The name “VNA” is clearly not generic, and the trial court’s so holding was erroneous as a matter of law.

Equally erroneous is the trial court’s holding that the Plaintiffs are guilty of laches. The law is clear that Defendants have the burden of showing that they suffered some prejudice by having undertaken some activity in reliance upon Plaintiffs acquiescence in their intrusion into Plaintiffs’ Trade Area. The trial court failed to make any such finding, and did not even address the issue.

The trial court did find that Plaintiffs presented “considerable evidence” on the issue of likelihood of confusion, but held that the case did not turn on that question. IN spite of this undisputed finding, the trial court went on to hold that as a matter of law Plaintiffs failed to show a likelihood of confusion. This contradictory finding cannot withstand any scrutiny, as confusion is presumed when the parties provide the same class of services, as here, even if the services are not identical.

Finally, it is clear from the findings of the trial court that the parties entered into a binding settlement agreement, the specific terms of which were well defined on all substantial matters. Matters omitted were either clearly implied by the parties, as Plaintiffs believed, or intentionally omitted by Defendants as unsubstantial. In either event, the policy of this Court to uphold settlement agreements should be enforced.

For all of the above reasons, the ruling of the trial court should be reversed with orders to either enforce the settlement agreement of the parties or to enter a permanent injunction preventing Defendants from using the names “VNA” or “Visiting Nurse Association” alone or in combination with other words within the Plaintiffs’ Trade Area.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for Appellants certifies as required by Rule 32(a)(7)(C) that the Opening Brief of Appellants complies with the word limitations contained in Rule 32(a)(7)(B)(i). The number of words used in the Opening Brief is shown to be 12,648 by the word count of the word processing system used in preparing the Opening Brief, a copy of which is attached hereto. The Opening Brief was prepared using Word with a Times New Roman font in 14 point size.

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